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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 62

FIRST NATIONAL BANK OF CINCINNATI, and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

No. 63

FIRST NATIONAL BANK OF CINCINNATI, and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

PETITION OF FIRST NATIONAL BANK OF CINCINNATI FOR A REHEARING

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PETITION OF FIRST NATIONAL BANK OF CINCINNATI FOR A REHEARING

To the Honorable Charles E. Hughes, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner FIRST NATIONAL BANK OF CINCINNATI respectfully prays for a rehearing herein for the following reasons:

(1) The Court in rendering its opinion bearing date January 8, 1934 herein, dealing under the heading

"THIRD" at pages 13-18 with the position and the rights of this petitioner, clearly acted under a misapprehension.

At page 16 the opinion states:

> "The relief which the Bank seeks is that sum in cash which it would have received if the property had been sold at a proper price."

This petitioner's brief herein at the final pages thereof contains the following:

"CONCLUSION

THE DECREES OF THE COURTS BELOW SHOULD NOT BE PERMITTED TO STAND.

Since the District Court, at the behest of the complainants (the Reorganization Committee), saw fit,—notwithstanding the pending appeal from the final decree of sale dated the 31st day of May, 1932,—to make its further decree dated the 8th day of September, 1932, directing the Receivers to convey to the nominee of the Reorganization Committee, viz., the new corporation organized by such Committee, all of the assets of the corporation, and since, pursuant thereto, such assets have passed out of the hands of the Court and into the hands of the new corporation where they have since been subject to change and waste, the fund as it stood in the hands of the Court has ceased to exist, so that a direction by this Court that the fund be duly administered by the District Court has become impossible of actual performance.

Under the Plan of Reorganization, a share in the assets has been unconditionally reserved in the old stockholders, although the Plan provides

for a reduction of the interest of the creditors as such in the fund. Such stockholders stand 'in the position of insolvent debtors who cannot reserve an interest as against their creditors,' and this doctrine is the 'fixed principle * * * and to it there should be rigid adherence.'

It is respectfully submitted that this Court should under the circumstances apply the remedy used by it in the case of *Shapiro* v. *Wilgus, supra,* and in the case of *Northern Pacific Railroad Company* v. *Boyd, supra,* and direct that this petitioner have a lien upon the assets of National Radiator Corporation (Maryland), the new corporation, for the amount of the principal of this petitioner's indebtedness with interest, costs and disbursements including counsel fees. The new corporation has been admitted as a party to the cause. Although this Court in its most recent decision upon the subject (*National Surety Co.* v. *Coriell, supra*) did not apply this remedy, it should be noted, that, before the decision was made by this Court, the new corporation in that case had been decreed to be a bankrupt and a sale in bankruptcy had been made of all of its assets to purchasers who were not before the Court."

The brief of this petitioner before the Circuit Court of Appeals asked for similar relief.

In the District Court this petitioner filed an answer to the petition filed by the complainants for the approval of the Plan, by which answer this petitioner set forth the following (R. 382):

"Four. That the plan of reorganization outlined in the petition for the approval thereof is unfair, and such petition contemplates the abuse

> of the powers of this Court in Equity for the mere purpose of effectuating the proposed plan of reorganization in fraud of the rights of non-assenting creditors, including these answering respondents. * * *"

To the petition for confirmation of sale which was filed together with the petition for the approval of the Plan, this petitioner filed objection which contained the following (R. 388):

> "Thirteen. The matter of confirmation of the sale should be postponed and held in abeyance, pending the decision by the Circuit Court of Appeals for the Third Circuit of the appeal which has been taken herein by the undersigned interveners from the final decree of sale herein, dated May 31, 1932."

This petitioner also made a motion in the District Court for postponement of the delivery of the conveyances to the new corporation pending the decision of the appeal (R. 476).

The question of the unfairness of the Plan was also presented by the assignments of error (XXXIV) (R. 340). This question and the question of the Court's power to act further after the perfecting of the appeal from the final decree of sale were also presented in the petition for writ of *certiorari* which states at pages 12 and 13:

> "(4) May a Federal court of equity in such a proceeding properly make a decree of sale for the purpose of effectuating a Plan of Reorganization which reduces the rights of the creditors as such

in the assets of the corporation, while preserving an interest for its preferred stockholders without the requirement of a contribution of new capital by such stockholders as the condition of the preservation of such interest?

(5) May a Federal court of equity in such a proceeding properly decree a sale of all the corporate assets for the purpose of effectuating a Plan of Reorganization under which some of the general creditors are paid in full in cash out of the assets of the corporation, while others are relegated to a dividend based upon an upset price fixed by the Court to yield approximately 15c to 20c on the dollar?

* * *

(7) Did not the District Court exceed its jurisdiction and power in making the decree, dated September 6, 1932, directing the transfer from the custody of the Court to the new corporation of the corporate assets (the trust fund) ordered to be sold under the final decree of sale, dated May 31, 1932, these petitioners having theretofore taken and perfected their appeal to the Circuit Court of Appeals from such final decree of sale, dated May 31, 1932?"

These questions were presented in the specifications of error at page 13 of this petitioner's brief herein and were fully argued as Point II (pp. 39-49) and Point III (pp. 49-51) of such brief.

(2) While it is a fact that this petitioner at the hearing upon the application for the decree of sale contended for the fixing of an adequate upset price; this petitioner at the same time contended that the Plan was unfair and

that the Court should not decree the making at all of the sale of the property as an entirety for the purpose of effectuating the unfair Plan. This petitioner argued orally and by printed brief in the District Court that the Plan was unfair and improper in the two respects set out in this petitioner's petition for a writ of *certiorari* and in its specifications of error herein; that it worked a conversion of the interests of the creditors for the benefit of the stockholders and thus violated the "fixed principle" set out in the case of *Louisville Trust Company* v. *Louisville N. A. & C. R. Co.* and the decisions of this Court which follow it; also that it made provision for the payment in full in cash of certain general creditors but not including this petitioner. The unfairness of the Plan in these two respects was argued before the District Court and before the Circuit Court of Appeals in virtually the same manner as argued before this Court by this petitioner under Point II of its brief (pp. 39-49).

It is also a fact that, upon the application to confirm the sale and direct delivery of the conveyances and to approve the Plan, this petitioner, in support of the answer thereto which it filed and of its motion for a postponement of the delivery of the deeds pending the determination of the appeal, cited to the District Court the cases referred to at page 49 of its brief herein. These cases we believe demonstrate that the District Court should not have directed the making of the conveyance to the new corporation in the face of the pendency of the duly perfected appeal.

Before the actual delivery of the deeds and other conveyances and the making of the whole affair a *fait accompli*, this petitioner applied to the Circuit Court of Ap-

peals for an appropriate order to preserve the *status quo* until the hearing and the decision of the then pending appeal, which relief the Circuit Court of Appeals refused to grant (Supplemental Record, 550-565). This petitioner, therefore, did everything it could to prevent the final accomplishment of the conversion for the benefit of the stockholders of this creditor's interest in the corporate assets.

(3) This petitioner intervened as a party to the cause for the reason that it was advised that unless it thus became a party, it would not have the right to appeal and that the proper protection of its rights might require that it be in a position to appeal,—which turned out to be the case.

This petitioner was advised that thus to intervene would have the consequence under the provisions of Equity Rule No. 37 of prohibiting this petitioner from questioning the jurisdiction of the Court to entertain the original bill.

But we submit that clearly this petitioner had the right to question the propriety of the decrees herein and particularly to question the propriety of the making of a decree for a perfunctory judicial sale of the property as an entirety for the purpose of effectuating an unfair plan, and that this petitioner had the right in that connection to contend that the Plan was unfair and to contend, as set forth at the bottom of page 47 of our brief herein, that:

> "The interest of stockholders is in every sense subordinate to the rights of creditors. We submit that under our system there is and should be

> no judicial process,—even including a Federal equity suit for the purpose of effectuating a Plan of Reorganization,—by which the stockholders of a corporation can bring about a conversion of its indebtedness for the stockholders' benefit."

Although this petitioner admitted, as it was bound to do because of Equity Rule No. 37, that the Court had jurisdiction, this petitioner has never at any stage of the proceeding admitted that the Court could properly make a decree for a perfunctory judicial sale of the property as an entirety for the purpose of effectuating an unfair Plan. This petitioner has not gone beyond the admission, for the purpose of argument, that the Court might with propriety make such a decree for the purpose of effectuating a *fair* Plan. But from the very beginning to the end of the litigation, this petitioner has claimed that this Plan was *unfair*.

The opinion contains at page 13 the following statement:

> "It (this petitioner) concedes that the Court could properly lend its aid to effectuate the proposed reorganization and, to this end, might sell the assets as an entirety."

This does not correctly reflect this petitioner's position. This petitioner's position throughout has been that *the Court could properly lend its aid to effectuate a* FAIR *plan and to the end of effectuating a* FAIR *plan might sell the assets as an entirety.*

If, as stated at page 44 of this petitioner's brief, the Plan had been made fair by the subscription by the stockholders of a substantial fund of new money, the

right to choose the securities under such Plan might well have been a thing of value exceeding the value of the distributive share under an upset price fairly determined.

Whatever admissions this petitioner may appear to have fallen into for the purposes of argument, it is, we submit, clear from the foregoing and from the whole context of its brief that its real position throughout has been that the Plan was unfair and that the judgments appealed from were erroneous in decreeing a perfunctory sale of the assets in their entirety for the purpose of effectuating such unfair Plan. The position of this petitioner throughout has been: (1) that a perfunctory judicial sale of the assets as an entirety could not properly be decreed for the purposes of effectuating an unfair plan; and (2) that, even for the purposes of effectuating a fair plan, such decree should provide for a fair upset price. As to both of these propositions we submit that this petitioner is manifestly right.

Under the decision of this Court in the case of *Northern Pacific Railroad Company* v. *Boyd*, a judgment creating a lien for the full amount of the claim of the creditor is proper where an interest in the assets of the reorganized corporation was reserved in the stockholders,—and that for the reason that "Stockholders are in the position of insolvent debtors who cannot reserve an interest as against their creditors."

(4) It seems a strange and an unfair result that, while the petitioners Artz and Ramsey in No. 64 and seemingly, too, the petitioner Clapier in No. 65 should have, in respect of their debentures, been awarded judgment for a lien upon the assets in the hands of the new

corporation for the full amount of their claim, this petitioner should not be awarded similar relief for which it prayed, but should be relegated to further proceedings in the District Court for the determination of an upset price with the delay, uncertainty and expenses attendant thereon.

This seems especially true when one considers that this petitioner was the only debenture holder who formally intervened in the proceeding before the main hearings and defended the rights of the debenture holders, and that this petitioner thereafter, with the assistance of the intervener International Heater Company, at their own labor and expense took and perfected the appeal and printed the record.

The petitioners Ramsey and Artz on the other hand merely appeared upon the return of the motions to confirm the sale and approve the Plan and claimed that the Court did not have jurisdiction to do so. Thereafter they purported to become appellants and they had printed a small supplementary record which in the record to this Court finally appeared as pages 483 to 531. They were treated as proper appellants by the Circuit Court of Appeals and thereafter they filed petitions upon writs of *certiorari* in this Court, which petitions were entertained and granted.

As a matter of fact, however, they did not formally intervene and become parties to the record and therefore, unless their appearance is to be deemed the equivalent of intervention, they had no position to act as appellants in questioning the decrees at all, for it is axiomatic that one who is not a party to the record cannot question the decree by way of appeal. If the appearance of Artz and

Ramsey is the equivalent of intervention, they became parties "in subordination to and recognition of the propriety of the main proceeding" (Equity Rule 37) in the same sense as did this petitioner.

It would seem that the Circuit Court of Appeals and this Court, in entertaining the appeal of these other parties and the filing by them of a petition for a writ of *certiorari,* must have taken the broad view that the steps that they took in the District Court were the equivalent of their becoming parties,—in other words, the equivalent of intervention. As remarked by this Court in its decision in the *Coriell* case, as well as in its opinion herein, these proceedings should not be regarded as ordinary adversary proceedings. The positions of the parties are rather anomalous.

Strict views must be disregarded in permitting the appellants Artz and Ramsey to be heard at all in the higher Courts, and certainly, since broad views have been entertained as to the positions of some of the parties, they should all be regarded as parties in the same sense. In such a view this petitioner could raise and have the benefit of any question that could be raised by any other party. This does not need to be pressed to the point, however, that this intervener or any other was in a position to question the jurisdiction of the Court for the simple reason that this Court did not decide that the District Court was without jurisdiction.

(5) At page 13 of the opinion, this Court states:

> "The Bank does not claim that the District Court was without equity jurisdiction or that the bill lacked equity."

This petitioner has not claimed and does not claim that the District Court was without equity jurisdiction. On the other hand, it has claimed throughout the whole course of the litigation that the bill lacked equity. This petitioner's petition to intervene (R. 95) sets forth:

> "(4) The original complainants herein, Flershem, Cornell, Waters and Cahn, as the so-called Reorganization Committee and proponents of the plan of reorganization attached to their Bill of Complaint, filed their said Bill of Complaint for the purpose of bringing about the receivership herein *as a step in effectuating said plan,* notwithstanding the opposition to such plan of your petitioner and of the other dissenting bondholders who have not seen fit to subscribe to such plan."

Attention is also called to this petitioner's assignments of error as follows:

> "II. The District Court erred in holding that at the time of the filing of the bill National Radiator Corporation had no means at hand with which to meet, pay or satisfy the interest charges on the debentures. (Decree, Article IV, paragraph 26.)" (R. 333)

> "X. The District Court erred in failing to hold that the complainants filed the bill of complaint herein for the purpose of bringing about the receivership as a step in effectuating the Plan and Agreement of Reorganization dated February 11, 1931." (R. 335)

> "XI. The District Court erred in holding that there was no evidence of collusion on the part

of the complainants, of the Bankers Trust Company and of National Radiator Corporation in connection with any of the proceedings herein (fol. 494). (Decree, Article IV, paragraph 27.)" (R. 335)

"XXXIV. The District Court erred in so shaping the decree as to effectuate the design of the Reorganization Committee to acquire the assets of the corporation for the purposes of the Reorganization Plan, in that—notwithstanding that the decree is so designed as to effectuate the passing of the property to the Reorganization Committee at a price very much less than could fairly be realized upon the assets if liquidated in normal course—the Plan provides for the sharing by the stockholders of the corporation in fraud and (fol. 502) in violation of the rights of the creditors, including these appellants, viz., the preferred stockholders to share freely and without any additional contribution whatsoever and the common stockholders to share upon a contribution nominal in amount." (R. 340-341)

The answer filed by this petitioner to the petition for the approval of the plan sets forth (R. 382):

"Four. That the plan of reorganization outlined in the petition for the approval thereof is unfair, and such petition contemplates the abuse of the powers of this Court in Equity for the mere purpose of effectuating the proposed plan of reorganization in fraud of the rights of non-assenting creditors, including these answering respondents. * * *"

> "Five. The final decree of sale herein dated May 31st, 1932, was made in contemplation of the complainants' plan of reorganization and this suit was brought as a mere step for the purpose of effectuating such plan. * * *"

At pages 14-15 of the petitioner's brief herein, it is stated:

> "The answer of the complainants and defendant to the intervening petition of the appellant herein states: 'The complainants admit that they filed the bill of complaint in this cause as a step in effectuating the Plan and Agreement of Reorganization dated February 11, 1931' (R. 99). *There is no such function of a federal equity suit in the event of insolvency, legal or equitable, of a private corporation.*"

and at page 47 of such brief, it is stated:

> "We submit that under our system there is and should be no judicial process,—even including a Federal equity suit for the purpose of effectuating a Plan of Reorganization,—by which the stockholders of a corporation can bring about a conversion of its indebtedness for the stockholders' benefit."

This position has been pressed by this petitioner throughout the whole litigation.

This petitioner in its petition for the writ of *certiorari* granted herein stated at page 15 thereof:

> "The courts below in this proceeding, as well as other Federal courts in other similar proceed-

> ings, have shown a tendency to depart from the accepted and usual course of judicial proceedings in that they have allowed themselves to be employed in proceedings designed to bring about the destruction of legal rights rather than the upholding and enforcement thereof, which is and should be their fundamental purpose."

While this petitioner did not formulate it in this way in its brief upon the argument, its whole argument nevertheless was directed to that conclusion. The arbitrary determination of the grossly inadequate upset price, which was discussed fully in Point I of this petitioner's brief, and the approval of the unfair Plan which resulted in the conversion of a part of the creditors' interest in the corporate assets for the benefit of the stockholders, which was argued at length in Point II of the brief, together go to show that the decrees below, which reflected the relief sought in the bill of complaint, went to defeat the legal rights of the creditors rather than to enforce or protect them. It was in line with this argument that this Court said in its opinion at page 10 thereof:

> "The power of the District Court was invoked, not to enforce rights of creditors, but to defeat them."

These words, we believe, set forth in the tersest form the fundamental vice of the decrees below.

While Equity Rule No. 37 prohibits this petitioner from questioning the jurisdiction of the Court, we do not believe that it prohibits it from claiming that the bill lacked equity.

Such a view would seem necessary, at least in respect of suits of this sort. Otherwise a group of creditors or stockholders could bring a Federal equity suit of this nature to effectuate an utterly unfair plan of reorganization, with the inevitable result that the non-assenting creditors whose rights are being violated would be without legal redress. This would be so for the reason that, by intervening in order to protect themselves from the violation of their rights through the accomplishment of the unfair plan, they would by virtue of Rule 37 at that moment become prohibited from criticizing it. Such a rule of procedure would be intolerable.

(6) The strangeness and unfairness of the result is again emphasized by the relief granted to the petitioner Clapier in No. 65. She was, it would seem in effect, granted a lien for the amount of her debentures in full although she merely brought a separate suit, the bill of complaint in which this Court has held was properly dismissed.

At page 13 the opinion states as follows:

> "The dismissal of the Clapier suit was, therefore, proper. But that decree should have been without prejudice to her right to prosecute her claim against the Corporation, the assets in the hands of the receivers and the new company. To this end she should be given leave *to intervene in the receivership suit* and there present her claim for such relief as may appear to be appropriate."

But if, as the Court suggests, Clapier should "intervene in the receivership suit," she would find herself in the same position as this petitioner.

(7) It is fair to surmise that but for the appeal of this petitioner from the two decrees, no phase of the case would ever have become the subject of determination in this Court. This petitioner had the clear status of a party to the record which entitled it to maintain the appeal and, perhaps, without such a party, the others who did not have such a clear status would not alone have been permitted to be heard.

(8) Notwithstanding any attendant difficulties against it which can arise from the effect of Equity Rule No. 37, this petitioner is entitled to a lien for the full amount of its claim. The Plan was unfair and the stockholders were in the position of insolvent debtors who cannot reserve an interest as against their creditors.

While this Court awarded to this petitioner the relief which the Court stated this petitioner sought, the Court clearly was acting under a misapprehension as to what the position of this petitioner has been throughout the litigation.

It seems strange and unfair that the other petitioning debenture holders, especially in view of the whole history of the litigation, should have been treated more favorably than this petitioner. Actually they and this petitioner occupy the same position, that of debenture holders, and, in a realistic view, it is hard to see how this petitioner should be regarded as entitled to less favorable treatment than the others.

WHEREFORE upon the foregoing grounds it is respectfully prayed that this petition for a rehearing be

granted and that the decision herein be modified so that this petitioner be awarded the relief prayed for in the "Conclusion" to its brief quoted at pages 2 and 3 hereof.

Respectfully submitted,

FIRST NATIONAL BANK OF CINCINNATI

By RALPH ROYALL
MANFRED W. EHRICH
SIDNEY J. WATTS
Counsel for Petitioner.

I, RALPH ROYALL, counsel for the above named FIRST NATIONAL BANK OF CINCINNATI, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Ralph Royall

Counsel for Petitioner First National Bank of Cincinnati.